Supreme Court, U.S.
FILED
JAN 20 2005
OFFICE OF THE CLERK

No. 03-9627

In the
Supreme Court of the United States

JOHN A. PACE,
Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE STATE OF ALABAMA FOR 26 STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Troy King
Attorney General

Stephanie N. Morman
Deputy Solicitor General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401, 242-7380 *

January 20, 2005

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL FOR AMICI CURIAE

MIKE BEEBE
ATTORNEY GENERAL
STATE OF ARKANSAS
200 Tower Bldg.
323 Center St.
Little Rock, AR 72201-2610

CHRISTOPHER L. MORANO
CHIEF STATE'S ATTORNEY
STATE OF CONNECTICUT
300 Corporate Place
Rocky Hill, CT 06067

JOHN W. SUTHERS
INTERIM ATTORNEY
GENERAL
STATE OF COLORADO
1525 Sherman St.
7th Floor
Denver, CO 80203

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
Department of Justice
820 N. French St.
Wilmington, DE 19801

THURBERT E. BAKER
ATTORNEY GENERAL
STATE OF GEORGIA
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
P.O. Box 83720
Boise, ID 83720-0010

LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
100 W. Randolph St.
12th Floor
Chicago, IL 60601

STEVE CARTER
ATTORNEY GENERAL
STATE OF INDIANA
302 W. Washington St.
IGCS – 5th Floor
Indianapolis, IN 46204

THOMAS J. MILLER
ATTORNEY GENERAL
STATE OF IOWA
Hoover State Office Bldg.
1305 E. Walnut
Des Moines, IA 50319

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Ave.
2nd Floor
Topeka, KS 66612-1597

G. STEVEN ROWE
ATTORNEY GENERAL
STATE OF MAINE
State House Station 6
Augusta, ME 04333

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL
STATE OF MARYLAND
200 Saint Paul Place
Baltimore, MD 21202

MICHAEL A. COX
ATTORNEY GENERAL
STATE OF MICHIGAN
P.O. Box 30212
Lansing, MI 48909

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL
STATE OF MISSOURI
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
ATTORNEY GENERAL
STATE OF MONTANA
P.O. Box 201401
Helena, MT 59620-1401

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St.
Columbus, OH 43215-3428

W.A. DREW EDMONDSON
ATTORNEY GENERAL
STATE OF OKLAHOMA
2300 N. Lincoln Blvd.,
Suite 112
Oklahoma City, OK 73105

HARDY MYERS
ATTORNEY GENERAL
STATE OF OREGON
1162 Court St. N.E.
Salem, OR 97301

THOMAS W. CORBETT, JR.
ATTORNEY GENERAL
COMMONWEALTH OF
PENNSYLVANIA
16th Floor, Strawberry Sq.
Harrisburg, PA 17120

PAUL G. SUMMERS
ATTORNEY GENERAL
STATE OF TENNESSEE
P.O. Box 20207
Nashville, TN 37201-0207

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
Capitol Station
P.O.Box 12548
Austin, TX 78711-2548

JERRY W. KILGORE
ATTORNEY GENERAL
COMMONWEALTH OF
VIRGINIA
900 East Main Street
Richmond, VA 23219

ROB MCKENNA
ATTORNEY GENERAL
STATE OF WASHINGTON
1125 Washington St.
P.O. Box 40100
Olympia, WA 98504-0100

PATRICK J. CRANK
ATTORNEY GENERAL
STATE OF WYOMING
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

When a state court applies its statute of limitation to preclude consideration of a state post-conviction petition, should this Court find, in accordance with the plain language of 28 U.S.C. § 2244(d)(2), its earlier decisions in *Artuz v. Bennett* and *Carey v. Saffold*, and principles of federalism, that the petition was not "properly filed" and thus did not toll the one-year statute of limitation applicable to federal habeas corpus petitions?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

ARGUMENT 6

I. The Ordinary Meaning Of § 2244(d)(2)'s Terms And This Court's Decisions In *Artuz v. Bennett* And *Carey v. Saffold* Demonstrate That An Untimely State Post-Conviction Petition Is Not "Properly Filed." 6

II. None Of Pace's Arguments For Recognizing An Untimely State Post-Conviction Petition As "Properly Filed" Withstands Scrutiny. 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Artuz v. Bennett, 531 U.S. 4 (2000) ..... passim

Carey v. Saffold, 536 U.S. 214 (2002) ..... passim

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 6

Coleman v. Thompson, 501 U.S. 722 (1991) 10, 17

Commonwealth v. Gamboa-Taylor, 753 A.2d 780 (Penn. 2000) 13

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 6

Duncan v. Walker, 533 U.S. 167 (2001) 17

Fahy v. Horn, 240 F.3d 239 (3rd Cir. 2001) 5

General Dynamics Land Systems, Inc. v. Cline, 124 S. Ct. 1236 (2004) 6

Harris v. Reed, 489 U.S. 255 (1989) 17

Merritt v. Blaine, 326 F.3d 157 (3rd Cir. 2003) 5

Mitchell v. State, 14 S.W.3d 672 (Mo. Ct. App. 2000) 12

Pace v. Vaughn, No. 02-3049, 2003 WL 21754982 (3rd Cir. July 30, 2003) 5

Petree v. State, 920 S.W.2d 819 (Ark. 1995) 12

Sanchez v. State, 86 P.3d 1 (Mont. 2004) 12

Williams v. State, 783 So. 2d 135 (Ala. Crim. App. 2000) 12

Williams v. Taylor, 529 U.S. 420 (2000) 10

Statutes

28 U.S.C. § 2244(d)(1) 4, 6, 16, 17

28 U.S.C. § 2244(d)(2) ..... passim

28 U.S.C. § 2254(c) 10

Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. § 9541 *et seq.* 2, 3, 4, 5

42 Pa. Cons. Stat. § 5103 14

42 Pa. Cons. Stat. § 9543 12

42 Pa. Cons. Stat. § 9545 ..... 2, 3, 4, 12

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) ..... passim

Mont. Code Ann. § 46-21-102(1) 12

Tenn. Code Ann. § 40-30-102(a) (1995) 12

Rules

Ala. R. Crim. P. 32.2 ..... 12, 15

Ala. R. Crim. P. 32.5 ..... 14, 15

Ala. R. Crim. P. 32.6 ..... 13, 15

Ark. R. Crim. P. 37.2(c) 12

Mo. R. Crim. P. 24.035 13

Pa. R. Crim. P. 1501(2) 14

Pa. R. Crim. P. 1504(e) 13

Sup. Ct. R. 37.4 1

INTEREST OF AMICI CURIAE

Pursuant to Sup. Ct. R. 37.4, the amici curiae States of Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kansas, Illinois, Indiana, Iowa, Maine, Maryland, Michigan, Missouri, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, and Wyoming respectfully submit this brief in support of respondent David DiGuglielmo. The Third Circuit held that petitioner John Pace's second state post-conviction petition, which was filed outside Pennsylvania's one-year statute of limitation, was not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2) – and, accordingly, did not statutorily toll the one-year limitation period applicable to his federal habeas petition under 28 U.S.C. § 2244(d)(1). Based on the ordinary meaning of § 2244(d)(2)'s language, as well as this Court's decisions in *Artuz v. Bennett*, 531 U.S. 4 (2000), and *Carey v. Saffold*, 536 U.S. 214 (2002), the amici states respectfully submit that the Third Circuit was correct.

The amici states are keenly interested in the continued recognition and enforcement of their duly enacted procedural rules. Statutes of limitation serve the important purpose of winnowing out claims that warrant consideration from those that will waste judicial resources. *See, e.g., Carey*, 536 U.S. at 226 (purpose to prevent "stale claims"). A reversal here would only permit, and perhaps even encourage, state prisoners to file repetitive, frivolous, and abusive state collateral petitions, all the while tolling the period for later filing a federal habeas petition.

STATEMENT OF THE CASE

1. Nearly 20 years ago, in the course of robbing a random pedestrian of a brown-bag lunch, petitioner John Pace beat the victim to death with a blackjack. On February 13, 1986, Pace allocuted to second degree murder in the Pennsylvania Court of Common Pleas and received a mandatory life sentence. He did not challenge his conviction on direct appeal.

2. Approximately five months after his conviction became final, on August 21, 1986, Pace filed a state post-conviction petition under the Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. § 9541 *et seq*. In the petition, Pace contended that his trial counsel had acted ineffectively and that his guilty plea had been unlawfully induced. Counsel was appointed on two different occasions; each time, Pace filed an amendment to his petition and was granted a hearing. At the second hearing, Pace testified that he had not understood the implications of receiving a sentence of life imprisonment. On July 23, 1991, the Pennsylvania Court of Common Pleas dismissed Pace's petition.

The Pennsylvania Superior Court affirmed the denial of post-conviction relief in an unpublished decision filed March 30, 1992. The decision became final 30 days later when Pace declined to seek discretionary review in the Pennsylvania Supreme Court.

3. On November 17, 1995, the Pennsylvania Legislature amended 42 Pa. Cons. Stat. § 9541 *et seq*. (then titled the Post Conviction Relief Act, or "PCRA") to establish a one-year statute of limitation. The new provision, 42 Pa. Cons. Stat. § 9545, included three statutory exceptions to the time-bar. More specifically,

the amended § 9545 required a post-conviction petition to be filed within a year of the conviction becoming final unless either (i) governmental inference thwarted the petitioner's ability to assert the claim earlier, (ii) the petitioner predicated his claim on newly-discovered facts, or (iii) the petitioner asserted a newly-recognized, retroactively-applicable federal or state constitutional right. To invoke one of the three enumerated exceptions, the amended § 9545 required the petitioner specifically to allege the exception in his petition. In addition, § 9545 required that "[a]ny petition invoking an exception ... shall be filed within 60 days of the date the claim could have been presented." *Id*. § 9545(b)(2). Finally, § 9545 included a savings clause: "[T]he amendment of ... [these provisions] shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition ... if the petitioner's first petition is filed within one year of the effective date of this act." *Id*. § 9545 note.

4. On November 27, 1996, Pace filed a second state post-conviction petition asserting – with one exception – the same claims that he had exhausted in his 1986 PCHA petition. Pace did not allege, as required by statute, that any of the enumerated exceptions to the PCRA's one-year limitation period applied to his petition.

Counsel was appointed and, in accordance with Pennsylvania procedure, filed a letter explaining that Pace's claims had no merit and a motion to withdraw from the case. The Commonwealth did not respond to Pace's petition. On July 23, 1997, the Pennsylvania Court of Common Pleas granted Pace's attorney's motion to withdraw and dismissed Pace's petition. Six

days later, on July 29, 1997, the court issued an opinion explaining that it had denied Pace's petition because the claims were precluded and meritless.

On appeal, the Commonwealth appeared and argued that, in any event, Pace's petition was untimely under the PCRA. The Pennsylvania Superior Court agreed and, in an opinion filed December 3, 1998, determined that Pace's petition was time-barred under § 9545's one-year statute of limitation. The court found that the statute of limitation was jurisdictional and, because Pace had not alleged (or a review otherwise revealed) that any of the three enumerated PCRA exceptions applied, held his petition precluded from review.

After the Pennsylvania Superior Court denied Pace's request for reargument, the Pennsylvania Supreme Court denied review on July 29, 1999.

5. In the meantime, Congress enacted and President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). AEDPA imposed a one-year limitation period on federal habeas corpus applications. 28 U.S.C. § 2244(d)(1). The period commences on one of several dates, including the date on which the petitioner's state-court judgment becomes final. Particularly relevant here, tolling of the one-year period is available during the time in which any "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2).

6. Pace filed a federal habeas corpus petition in the United States District Court for the Eastern District of Pennsylvania on December 23, 1999. The magistrate judge recommended dismissal of Pace's

petition as untimely under AEDPA's one-year statute. Importantly for present purposes, the magistrate concluded that Pace's second state post-conviction petition had not tolled the limitation period; because the Pennsylvania courts had found the petition to be time-barred, it had not, the magistrate found, been "properly filed" under state law within the meaning of § 2244(d)(2).

The district court disagreed. It ruled that Pace was entitled under AEDPA to both statutory and equitable tolling; as a result, the court held that Pace had, in fact, timely filed his federal habeas corpus petition. The court refused to follow the Third Circuit's decision in *Fahy v. Horn*, 240 F.3d 239 (3rd Cir. 2001), which had rejected statutory tolling for untimely state collateral petitions.

While the case was pending in the district court, the Third Circuit, in *Merritt v. Blaine*, 326 F.3d 157 (3rd Cir. 2003), had reaffirmed its view that an untimely state post-conviction petition does not trigger statutory tolling under AEDPA and, further, clarified that an alleged mistake of law does not justify equitable tolling in a non-capital case.

In accordance with its earlier decisions in *Fahy* and *Merritt*, the Third Circuit reversed in Pace's case. It held that because Pace's second state post-conviction petition had been untimely filed under state law, it had not been "properly filed" within the meaning of § 2244(d)(2) and, thus, did not statutorily toll the one-year federal statute of limitation. *Pace v. Vaughn*, No. 02-3049, 2003 WL 21754982, at *1 (3rd Cir. July 30, 2003). The court further concluded that Pace was not entitled to equitable tolling of the statutory period – first, because he did not prove that "the lack of certainty as to how Pennsylvania courts would

interpret the PCRA" was "an 'extraordinary' circumstance," and second, because he did not promptly pursue post-conviction relief once "'Pennsylvania law as to the time bar of the PCRA became clear." *Id.* at *2.

ARGUMENT

I. The Ordinary Meaning Of § 2244(d)(2)'s Terms And This Court's Decisions In *Artuz v. Bennett* And *Carey v. Saffold* Demonstrate That An Untimely State Post-Conviction Petition Is Not "Properly Filed."

In this case, the Court must squarely address the question left unanswered in *Artuz v. Bennett*, 531 U.S. 4, 8 n.2 (2000): Whether a state post-conviction petition that the state courts have rejected as untimely under state law is nonetheless "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), so as to toll the one-year statute of limitation contained in 28 U.S.C. § 2244(d)(1). To say that the question is unanswered, however, is not to say that this Court's decisions do not suggest a resolution. In fact, as we will show, they do so rather clearly.

1. But let's start with § 2244(d)(2)'s text. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) ("The starting point for [the] interpretation of a statute is always its language."). More specifically, let's start, in accordance this Court's recent decisions, with the question of how "ordinary people in common usage" would understand what it means for a document to be "properly filed" – not just filed, but *properly* filed. *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1243 (2004); *accord Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) ("ordinary English"). It seems to

us inconceivable that the ordinary speaker, listener, writer, or reader of American English would think that a *late* pleading – or objection, motion, notice, brief, etc. – was filed "properly." Does the groom act "properly" when he shows up an hour late to his own wedding? Is it "proper[]" for a business traveler to arrive at the airport at 7:00 to catch a 5:30 flight? Can a prospective employee waltz into an interview even 10 minutes late and expect to impress? We live – necessarily – in a world chock full of deadlines. In that world – the real world – lateness is perhaps no mortal sin, but it is by no means "proper[]," either.

2. This Court's decisions confirm the commonsense conclusion that a late petition is not a "properly filed" petition. For starters, *Artuz* itself focused on everyday "common usage" in approaching the term "properly filed." 531 U.S. at 9. And against that measure, the Court indicated that, at least as a presumptive matter, a time-barred state post-conviction petition would *not* be deemed "properly filed" for § 2244(d)(2) tolling purposes. Specifically, the Court defined the term "properly filed" to require "delivery and acceptance ... [of] an application ... in compliance with the applicable laws and rules governing filings." *Id.* at 8-9. And in turn, the Court explained that the "laws and rules governing filings" – *i.e.*, the conditions to "proper[] fil[ing]" under § 2244(d)(2) – include conformity with "the time limits on [an application's] delivery." *Id.* That conclusion follows straightaway from AEDPA's plain language and is eminently sensible. Now, to be sure, the Court reserved judgment on the specific question whether exceptions to a state statute of limitation might "*prevent* a late application from being *improperly* filed" *id.* at 8 n.2; the point here is simply that the Court's opinion makes clear that, at least as a

presumptive matter, a late post-conviction petition is *not* a "properly filed" post-conviction petition.[1]

Carey v. Saffold, 536 U.S. 214 (2002), points to the same conclusion – that a *late*-filed state petition is not "properly filed" for § 2244(d)(2) purposes. Indeed, as explained below, four members of the Court offered not just a suggestion, but a definitive answer to the question presented here. The issue in *Saffold*, of course, was whether a state post-conviction petition is "pending" for § 2244(d)(2) purposes during the intervals between stages of state-court review – say, between the decision of an intermediate appellate court and the state's highest court.[2] This Court answered that question in the affirmative, but with an important caveat: In order to qualify as "pending," the appeal (or in California's unique system, the renewed petition) must be filed in a timely manner. The California Supreme Court's treatment of Saffold's post-conviction petition gave rise to an ambiguity; that court had denied Saffold's petition – which had been filed 4½ months after the intermediate court's ruling – "on the

[1] Indeed, the view that a post-conviction petition must be timely filed in order to be deemed "properly filed" was (at least arguably) not even disputed in *Artuz*. The inmate-respondent there observed in his brief (and again at oral argument) that "[w]hen the task to be accomplished is the filing of a document, that task is completed 'properly' when the established requirements for filing – delivery of the correct document to the designated authority *at the right time* – have been met." Br. for Resp. 17 (emphasis added) (citations omitted); *see also* Tr. of Oral Arg. at 29 (A: "[Prisoners] must file the right document with the right custodian in the right time ... ." Q: "And also, a timely filing?" A: "That's correct.").

[2] Pace's argument that *Saffold* is categorically irrelevant here because it addresses the term "pending" rather than "properly filed" is, with respect, myopic. Pet. Br. 32. It is *Saffold*'s *reasoning*, not its specific holding, that suggests this case's proper resolution.

merits and for lack of diligence." 536 U.S. at 225. That statement led to the question whether the state supreme court had, in fact, found Saffold's renewed petition untimely – in which case, this Court said, "his application would no longer have been 'pending' during th[e] period" of lateness. *Id.* Given the vagueness of the state supreme court's order, that question was simply unanswerable on the record this Court had before it (hence, the remand to the Ninth Circuit).

Notably for present purposes, however, this Court emphasized that it would have deferred (and, presumably, would defer in the future) to a state court's unambiguous decision concerning timeliness: "If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable'" – untimely, California post-conviction lingo – "that would be the end of the matter, regardless whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.* at 226. What *Saffold* suggests for the present case, therefore, is that when a state court definitively concludes – as did the Pennsylvania courts here – that an inmate's post-conviction petition is untimely, "that [is] the end of the matter," *id.*, and that a federal court sitting in habeas should defer to that determination.

As mentioned, four members of the *Saffold* Court left less to the imagination. In an effort to avoid precisely the rule that this Court adopted – that with respect to a filing's timeliness, what a state court says, goes – Saffold had argued that, perhaps, the California Supreme Court's "lack of diligence" finding related *not* to his 4½-month delay in seeking relief from the state high court, but, instead, to his five-year delay in pursuing any state post-conviction relief in the first place. The Court, for its part, noted that Saffold's

initial five-year delay was "irrelevant to the question whether his application was 'pending' during" later intervals between review stages. *Id.* at 226. Writing in dissent for himself, as well as for the Chief Justice and Justices Scalia and Thomas, Justice Kennedy responded that, in any event, "[t]his ambiguity ... should not benefit" Saffold. *Id.* at 236 (Kennedy, J., dissenting). In explaining why not, the *Saffold* dissenters clearly telegraphed the answer to the question presented in this case: If, they said, the California court had "held that all of [Saffold's] state habeas petitions were years overdue, *then they were not 'properly filed' at all, and there would be no tolling of the federal limitations period.*" *Id.* (emphasis added).[3] In other words, when a state court concludes – as have the Pennsylvania courts here – that a state prisoner's post-conviction petition was "overdue," a federal court sitting in habeas must likewise conclude that the petition was not "properly filed" in the first place, and must refuse federal tolling.

3. To round matters out, it is important to note that AEDPA's purpose and policy also support the view that an untimely state post-conviction petition is not "properly filed." AEDPA was adopted with the intention to "further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Like the rules of exhaustion, *see* 28 U.S.C. § 2254(c), and procedural default, *see Coleman v. Thompson*, 501 U.S. 722, 731 (1991), § 2244(d)(2)'s one-year statute of limitation promotes the finality of state

[3] Notably, for support, Justice Kennedy cited the very page in *Artuz* where this Court had concluded, at least presumptively, that a "properly filed" application must comply with "the time limits on ... delivery." 536 U.S. at 236 (citing *Artuz*, 531 U.S. at 8).

court judgments. The values of comity, finality, and federalism would undoubtedly be undermined if a federal court could turn a blind eye to a state court's ruling concerning timeliness and use a late-filed post-conviction petition as the basis for tolling the federal limitation period. In petitioner's world, state prisoners could prolong tolling indefinitely while they churned new claims in state court or, for that matter, simply waited around for some fortuitous occurrence. But (it goes without saying) Congress included a limitation period was included in AEDPA to *restrict* the time in which inmates could pursue habeas review. AEDPA's purpose is effectuated by tolling the federal period of limitation only for the periods of time during which the state petitioner could have legitimately pursued state post-conviction relief. AEDPA's purpose is gutted by Pace's proposed resolution.

II. None Of Pace's Arguments For Recognizing An Untimely State Post-Conviction Petition As "Properly Filed" Withstands Scrutiny.

Pace offers several reasons for concluding that a late post-conviction petition should nonetheless be deemed "properly filed." None is persuasive.

1. Pace first seems to suggest that, because decisions about timeliness may require some thought – and judicial involvement – timeliness cannot be a true "condition to filing" within the meaning of *Artuz*. Pet. Br. 23-29. But *Artuz* itself defeats that argument. Whatever else *Artuz* may say or suggest about the meaning of the term "properly filed," it makes plain that at least two requirements are indeed "condition[s] to filing" – the failure of which precludes a state application from being "properly filed" within the meaning of § 2244(d)(2). Those conditions are (i)

jurisdiction and (ii) the payment of the required filing fee. *See* 531 U.S. at 9 ("If, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction, or is erroneously accepted without the requisite filing fee, it will be *pending*, but not *properly filed*.").

On this score, there are two things worth noting. As an initial matter, as respondent's brief explains in detail, in many states – including Pennsylvania – timeliness is *expressly* a "jurisdiction[al]" requirement and thus, under *Artuz*, a true "condition to filing." Resp. Br. 12. As if to drive that point home, the Pennsylvania Legislature placed the post-conviction statute of limitation *not* in the "Eligibility for Relief" section alongside the laches and successive-petition provisions, *see* 42 Pa. Cons. Stat. § 9543, but, instead, in a separate section titled "Jurisdiction and Proceedings," *id.* § 9545. Alabama utilized restrictive language to achieve precisely the same result. The sections of Alabama's post-conviction-petition rule governing procedurally barred, successive, and ineffective assistance of counsel claims merely preclude courts from granting "relief." Ala. R. Crim. P. 32.2(a), (b), (d). The section establishing a one-year statute of limitation, by contrast, states more broadly that a court "shall not *entertain*" a late-filed petition. Ala. R. Crim. P. 32.2(c) (emphasis added).[4] Common sense dictates

[4] *See also, e.g.*, Tenn. Code Ann. § 40-30-102(a) (1995) ("No court shall have *jurisdiction* to consider a petition" filed after the one-year statute of limitation); *Williams v. State*, 783 So. 2d 135, 137 (Ala. Crim. App. 2000) ("the failure to file a Rule 32 petition within the two-year limitations period is a jurisdictional defect"); *Petree v. State*, 920 S.W.2d 819, 820 (Ark. 1995) (stating that, when the filing deadline under Rule 37.2(c) of the Arkansas Rules of Criminal Procedure is "not met, a circuit court lacks jurisdiction to consider the ... petition"); *Mitchell v. State*, 14 S.W.3d 672, 673 (Mo. Ct. App. 2000) (defining the timeliness requirement of Mo. R. Crim. P. 24.035 as "jurisdictional"); *Sanchez v. State*, 86 P.3d 1, 2 (Mont. 2004) (explaining that the "time limitation" contained in Mont. Code Ann. § 46-21-102(1) "is a jurisdictional limit on litigation"); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 783-84 (Penn. 2000) ("the time limitations of the 1995 amendments are jurisdictional").

that a state post-conviction petition cannot be "properly filed" when the state itself disclaims any authority even to consider it.

Second, on a more general level, rarely, if ever, will jurisdiction (in the traditional sense) or the sufficiency of a filing fee be obvious on a review of the face of a pleading. As to jurisdiction, a trial judge is asked – indeed, required – to apply his knowledge of the law to determine whether the issues raised do, in fact, implicate or affect the convicting court's ability to bring the petitioner into court, try him on the charges listed in the indictment, and impose a sentence. A trial court clerk would not be expected to – and, as a practical matter, is not required to – possess adequate knowledge of the law to determine, for instance, whether an indictment alleged all of the essential elements of the charged offense, whether a crime is a lesser-included offense of the charge contained in the indictment, or whether the sentence imposed was illegal.

The same is true of filing fees. Indeed, both Pennsylvania's and Alabama's post-conviction statutes state that, although payment of a filing fee is required as a general matter, it may be waived if a petitioner can convince a *judge* – not a court clerk – that he is entitled to proceed in forma pauperis. *See* Pa. R. Crim. P. 1504(e); Ala. R. Crim. P. 32.6(a). As this Court

knows, the question whether a particular litigant's circumstances justify IFP status (and a corresponding waiver of the filing fee) is not a matter of mere formality. Oftentimes, the determination of poverty presents a close question and requires an exercise of judgment. In any event, the point is that, by singling out jurisdiction and filing fees as examples, this Court has already implicitly rejected Pace's contention that, in order to qualify as a "condition to filing" – and thus a "proper[] fil[ing]" requirement under § 2244(d)(2) – the condition must be one capable of rote or reflexive application.

2. Relatedly, Pace repeatedly suggests that the only real "condition to filing" is the lodging of the petition in the correct court. Pet. Br. 20, 25, 27-29. Pace's argument is misguided and is indicative of a larger defect in his interpretation of the term "properly filed." In Pace's view, the only "condition to filing" is one that, if not satisfied, will cause a court (or even a court clerk) to turn away a petition at the courthouse door. (For a colorful analogy, see respondent's discussion of "hot potato." Resp. Br. 16.) But on that understanding, not even Pace's chosen example – filing in the right court – is a true "condition to filing." Again, Pennsylvania's and Alabama's procedural rules coincide. Both expressly require filing in a particular court – specifically, the court of conviction. *See* Pa. R. Crim. P. 1501(2); Ala. R. Crim. P. 32.5. But – and this a where Pace's theory of filing requirements begins to unravel – both also *expressly* provide that if a petition is filed in the wrong court, it will *not* be struck for non-compliance or even returned for refiling; rather, it will simply be transferred to the proper venue. *See* 42 Pa. Cons. Stat. § 5103; Ala. R. Crim. P. 32.5. Accordingly, just the tiniest little bit of digging reveals that, on Pace's view, the category of "condition[s] to filing" that

this Court established in *Artuz* is actually an empty set. There are, from his perspective, simply no such conditions. That, to be sure, is the rule most accommodating of litigious state prisoners, but it is just as surely not the interpretation Congress intended when it enacted the AEDPA for the very purpose of streamlining the post-conviction process.

In the real world, there is nothing that would lead one to conclude that timeliness is any less (let alone categorically less) a "condition to filing" than other traditional threshold considerations. Alabama's filing requirements are illustrative. Alabama Rule of Criminal Procedure 32, which governs all post-conviction proceedings, entails requirements that the inmate's petition be filed (i) within a specified time, Ala. R. Crim. P. 32.2(c); (ii) in a particular court, Ala. R. Crim. P. 32.5; (iii) in a defined form, Ala. R. Crim. P. 32.6(a); (iv) accompanied by a designated number of copies, Ala. R. Crim. P. 32.6(a); (v) along with a filing fee, Ala. R. Crim. P. 32.6(a); and (vi) containing a full and clear statement of the grounds for relief, Ala. R. Crim. P. 32.6(b). None of these requirements, either facially or practically, is any less a "condition to filing" than another. All use mandatory language (*e.g.*, "shall be filed"), and all are prerequisites to judicial consideration. Indeed, to the extent that these various requirements admit of any distinction, that distinction suggests that time limits perhaps *particularly* qualify as "condition[s] to filing." As noted above (*see supra* at 12), unlike other provisions of Rule 32 that merely preclude "relief" – for procedurally barred, successive, and ineffective-assistance-based petitions, *see* Ala. R. Crim. P. 32.2(a), (b), (d) – Rule 32's timeliness provision prohibits a court from even "entertain[ing]" a late petition, Ala. R. Crim. P. 32.2(c).

3. Pace also argues (Pet. Br. 26-29) that, by its nature, a statute of limitation applies on a claim-by-claim basis and, accordingly, cannot be a "proper[] fil[ing]" requirement, which this Court said in *Artuz* must apply to an entire "application." 531 U.S. at 10. Pace is wrong on two counts. First, AEDPA's own statute of limitation rebuts his descriptive claim. Section 2244(d)(1) provides that "[a] 1-year period of limitation shall apply to an *application* for a writ of habeas corpus ... ." Plainly, Congress did not view as incongruous the notion that a statute of limitation could be understood as applying to an "application" for collateral relief.

Second, to the extent that the claim-application dichotomy could be understood to create any problem, it admits of a simple solution: If a post-conviction petition contains *any* claim that is not time-barred, the petition itself – *i.e.*, the "application" – is "properly filed" for § 2244 purposes. If, on the other hand, all claims within the petition are time-barred, the petition itself is untimely and thus "[im]properly filed." Indeed, that is precisely the analysis that § 2244(d)(2)'s language seems to require. Throughout his brief, Pace focuses exclusively on the requirement of a "properly filed application." But what § 2244(d)(2) actually requires is a "properly filed application ... with respect to the pertinent judgment *or claim*." As respondent says in his brief, "under the statute, all it takes is one" timely claim to render the "application" "properly filed" within the meaning of § 2244(d)(2). Resp. Br. 24. On this sensible reading, in whatever posture a petition is presented, the reviewing federal court will be able to apply the "properly filed" standard with certainty.

4. Finally, Pace raises the specter of "protective petitions." Pet. Br. 30-32. If, he warns, a state court

lingers too long in deciding a timeliness issue, a petitioner may be compelled to go ahead and file in federal court to avoid missing his one-year federal window. There are several responses. First, *Artuz* confronted the question of protective filings – and promptly tabled it. Such policy concerns, the Court held, are for Congress, not the judiciary; the Court's duty consists in ascertaining the best "interpretation of the text." *Id*; *see also Duncan v. Walker*, 533 U.S. 167, 181 (2001) (rejecting "unfairness" argument and emphasizing that the Court's "sole task ... is statutory construction"). Second, there is a certain "no harm, no foul" principle at work here. Even if he were not bounced under § 2244(d)(1)'s statute of limitation, a habeas petitioner whose claim had been rejected in state court as untimely would lose in federal court under the doctrine of procedural default. *See Harris v. Reed*, 489 U.S. 255, 263 (1989); *Coleman v. Thompson*, 501 U.S. at 729.

Third, and in any event, Pace overstates the threat of protective filings. Protective filings are not a new phenomenon. In some form or another, protective filings occur on a fairly regular basis in (at least some) federal courts. (The propriety of the so-called "stay and abeyance" procedure – a form of protective filing – is presently before this Court in *Rhines v. Weber*, No. 03-9046.) While by no means an ideal resolution – for either the federal courts or the States responding to prisoners' filings – protective filings are, so to speak, the devil we know. The devil we don't know – and, amici submit, don't want to know – is Pace's freewheeling construction of § 2244(d)(2), pursuant to which an inmate could file repetitive and untimely state petitions and, by the sheer act of doing so, indefinitely toll his federal limitation period.

CONCLUSION

For the foregoing reasons, the amici States submit that the decision below should be affirmed.

Respectfully submitted,

Troy King
Attorney General

Stephanie N. Morman
Deputy Solicitor General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401, 242-7380 *

(Additional counsel for amici curiae are listed inside the front cover.)

January 20, 2005